No. 86-989

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BENJAMIN WARD, in his official capacity as Police Commissioner of the City of New York, EDWARD I. KOCH, in his official capacity as the Mayor of the City of New York, and the NEW YORK CITY POLICE DEPARTMENT,

Petitioners,

-against-

MICHAEL J. OLIVIERI, et al.,

Respondents.

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

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February 6, 1987

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Pursuant to Rule 22.5 of the Rules of this Court, petitioners submit this brief in reply to the brief submitted by respondents in opposition to the petition for certiorari.

ARGUMENT

(1)

Judged by its tone, one might infer from respondents' brief that petitioners had relegated them to some location distant from St. Patrick's Cathedral or the line of the Gay Pride March and thereby prevented them from reaching their intended audience. See Question 1(a) of Respondents' Counter-statement of Questions Presented For Review ("... the only justification offered by the police in prohibiting Respondents' symbolic speech ..."); see also, Br. Op., p. 30 ("reason ... for the 'freeze' was to suppress the symbolic speech") (emphasis added). The overstatement of respondents' brief is illustrated by the very precedent which they cite. See, e.g., Williams v. Wallace, 240 F. Supp. 100, 104 (M.D. Ala. 1965), where District Judge Frank Johnson issued an injunction against Alabama officials

where the police had harassed blacks demonstrating in connection with voter registration drives; such harassment included beatings and the use of cattle prods on the marchers.

As we indicated in the petition, this case concerns only the side of Fifth Avenue from which respondents may demonstrate, and despite respondents' desire for the most interesting backdrop for their demonstration, there has been no violation of their rights of free speech. While respondents' brief contains numerous citations to decisions dealing with free speech issues, they have failed to present to the Court of Appeals, or to this Court, precedent showing that the de minimus restriction on their First Amendment rights constitutes a "heckler's veto." In light of the Court of Appeals' holding that both respondents and the counter-demonstrators had free speech rights

which must be considered, petitioners' even-handed accommodation of both groups is the antithesis of a "heckler's veto."

Respondents alternatively argue that the petitioners' actions were shown to be content-discriminatory because of the "conclusion that the police acted not out of concern for the public safety but out of subjective sympathy with the institutional Church." Br. Op., p. 35. The "conclusion" to which respondents refer is the District Court's comment that, in light of its belief that the petitioners' concern for public safety was irrational, a "more convincing explanation for the police decision is ... police sensitivity to the discomfort of counter-demonstrators and the Catholic Church, as well, perhaps, as discomfort

within the Police Department ...." (A136).[1] However, as we read its opinion, the District Court conceded that evidence of police "complicity" with the Church was not sufficient to show that the actions of the police were not content-neutral and relied on its own second - guessing of police fears of violence in speculating that the restriction was the result of content discrimination (A136, A150-52). As we show in our petition, this kind of vague speculation by the District Court, supported by its own judgment as to the wisdom of police actions, is insufficient to constitute a finding that

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[1]References preceded by "A" are to the Appendix to the Petition. References preceded by "CA" are to the Joint Appendix in the Court of Appeals.

the substantial motivating factor of the police action was concern for public safety.[2]

(2)

We do not urge, as respondents suggest we do, that the federal judiciary plays no role in reviewing police time, place and manner restrictions. However, we believe that the lower courts should not be making the kind of judgments engaged in by the District Court (e.g., speculating as to the police department's ability to maintain order

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[2]We do not mean to concede that the District Court's comments about police "complicity" with the Archdiocese are supported by the record; we believe that its reference to certain isolated pieces of evidence, restated in respondents' brief, constitutes a misreading of the record which transforms the petitioners' attempts to communicate with all parties interested in the parade, including respondents (CA 171-72), into complicity with the Archdiocese or anti-gay forces (A151-52). However, as we outline above, the District Court's comments about such evidence is irrelevant to the legality of petitioners' actions.

should violence arise [A125]),[3] or as did the Court of Appeals, second-guessing the police in their judgment as to the most prudent manner of resolving competing, First Amendment interests. Significantly, in light of the Court of Appeals holding that the petitioners must accommodate the First Amendment rights of the counter-demonstrators, and its modification of the District Court order so as to allow each group on the sidewalk at different times, any assertion that the petitioners' "freeze" of the Cathedral sidewalk does not further a significant government interest is baseless.

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[3]Respondents claim that the District Court merely effectuated a plan formulated by petitioners in drafting its injunctive order (A158-59). Such plan, however, was formulated only on the contingency that the District Court's order on the application for a preliminary injunction survived appeal, and was not a plan that petitioners felt was appropriate (CA260, CA266-67; A129-32).

However, even absent the Court of Appeals' modification, there is no basis on this record for determining that the minimal intrusion of the "freeze" does not further a substantial government interest. See United States v. Albertine, __U.S.__, 105 S. Ct. 2897, 2907 (1985).

Finally, respondents seek to distinguish Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) and White House Vigil v. Clark, 746 F.2d 1518 (D. C. Cir., 1984), essentially on the grounds that those cases involve administrative regulations. We are aware of no precedent mandating that content-neutral police determinations be given less deference than administrative regulations under a time, place and manner analysis. If there should be policies effectuated by such lesser deference, the Court should grant the petition and set forth those policies.

Contrary to petitioners' assertion that this case presents "unique" facts, this case raises important constitutional issues concerning municipalities' power to insure public safety on their streets and sidewalks so that the viewpoint of all, including respondents, may be safely expressed.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

February 6, 1987

Respectfully submitted,

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